NEW YORK APPELLATE DIGEST, INC.

Criminal Law
Reversal Report
December 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversal, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in December 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" In the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Table of Contents

Contents

APPEALS, PEOPLE'S APPEAL, VACATION OF CONVICTION REVERSED.

ON THE PEOPLE'S APPEAL, THE TRIAL COURT'S VACATION OF THE JUDGMENT OF CONVICTION BASED ON NEW EVIDENCE WAS REVERSED; THE NEW EVIDENCE INDICATED THAT, ALTHOUGH DEFENDANT WAS NOT THE SHOOTER, DEFENDANT WAS AN ACCOMPLICE TO THE SHOOTER; AN INTERMEDIATE APPELLATE COURT CAN ONLY CONSIDER THE TRIAL COURT'S GROUNDS FOR ITS RULINGS, OR RULINGS ADVERSE TO THE APPELLANT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and denying the motion to vacate the criminal possession of a weapon conviction, determined new evidence which indicated defendant was not the shooter but had provided the machine gun to the shooter (Scott) would not have resulted in a more favorable verdict. Defendant would have been convicted as an accomplice. In rejecting an argument on appeal that was not part of the ruling below, the Fourth Department explained that its appellate jurisdiction is limited to grounds relied on by the trial court which were adverse to the appellant:

… [W]e conclude that the evidence in question is not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g] …). Scott's deposition testimony establishes that defendant possessed the loaded machine gun, provided it to Scott, transported Scott to the vicinity of the crime, and had a motive to harm the victims because his family had "beef" with theirs, thus providing sufficient evidence to support a verdict of guilty as an accomplice to the weapons

possession of which he was convicted … . ” ‘[W]hether one is the actual perpetrator of the offense or an accomplice is, with respect to criminal liability for the offense, irrelevant’ ” … .

Defendant requests that we affirm on the ground, which he asserted in the court below, that consideration of the new evidence in light of a theory of accessorial liability requires an impermissible amendment to the indictment. We agree with the People that we have no authority to affirm on that basis … .

Under CPL 470.15 (1), “[u]pon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.” * * * The Appellate Division engages in “the type of appellate overreaching prohibited by CPL 470.15 (1)” when it “renders a decision on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in [the appellant’s] favor” … .

Here, the court determined that “the accessorial liability theory, if presented at a new trial, would not constitute an impermissible amendment to the indictment in violation of the defendant’s constitutional rights,” clearly resolving that issue in the People’s favor. People v Dixon, 2024 NY Slip Op 06473, Fourth Dept 12-20-24

Practice Point: New evidence indicated defendant was not the shooter but had provided the weapon to the shooter with the requisite intent. Because the new evidence would not have resulted in a more favorable verdict on the criminal possession of a weapon charge, defendant’s motion to vacate the judgment of conviction should have been denied.

Practice Point: An intermediate appellate court can only consider grounds for rulings relied on by the trial court or rulings adverse to the appellant.

December 20, 2024

BURGLARY, HANDGUN USED AS A BLUDGEON.

A HANDGUN USED AS BLUDGEON IS A "DANGEROUS INSTRUMENT" WHICH WILL SUPPORT A BURGLARY FIRST DEGREE COUNT; COUNTY COURT SHOULD NOT HAVE REDUCED THE CHARGE TO BURGLARY SECOND (FOURTH DEPT).

The Fourth Department, reversing County Court and reinstating the reduced count, determined the handgun with which the victim was allegedly struck was a "dangerous instrument" despite the fact it had not been fired. County Court had reduced the charge from Burglary first to Burglary second on the ground the handgun had not been shown to be a "dangerous instrument:"

The People were required to present competent evidence to the grand jury demonstrating that defendant or another participant in the crime used, or threatened the immediate use of, a dangerous instrument (see Penal Law § 140.30 [3]). A dangerous instrument is defined as "any instrument, article or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (§ 10.00 [13]).

At the grand jury hearing, the victim testified that three men entered her apartment and the first man who walked in had a gun. She further testified that, at one point, "the guy with the gun" became "more upset" and hit her "upside the head" with the gun.

It is well established that "a 'gun [that is] used as a bludgeon' is a dangerous instrument" … because it " 'is readily capable of causing death or other serious physical injury' " … . Here, County Court ruled that the evidence before the grand jury was legally insufficient to establish that the item used by defendant or another participant in the crime was a dangerous instrument because it was not discharged during the incident and there was no evidence that the item was recovered or tested. That was error. We agree with the People that they were not required to submit evidence that the item described by the victim as a gun was an operable or loaded firearm in order to meet the dangerous instrument element of the crime … . We further agree with the People that they were not required to prove that the victim suffered an injury but, rather, needed only to establish that "under the circumstances in which [the instrument, article, or substance was] used . . . or threatened to be used, [it was] readily capable of causing death or other serious

physical injury" (Penal Law § 10.00 [13] …). It is reasonable for a grand jury to infer that hitting the victim on the side of the victim's head with a gun could cause serious physical injury. Thus, the evidence was sufficient to permit the inference that defendant or another participant in the crime used a dangerous instrument … . People v Delee, 2024 NY Slip Op 06491, Fourth Dept 12-20-24

Practice Point: A handgun used as a bludgeon is a "dangerous instrument" within the meaning of the Penal Law and the Burglary First Degree statute. The People need not show the handgun was operable or that the victim suffered a serious injury.

December 20, 2024

CIVIL RIGHTS LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW.

THE COMPLAINT STATED CAUSES OF ACTION PURSUANT TO 18 USC 1983 AGAINST INDIVIDUAL POLICE OFFICERS FOR DEPRIVING PLAINTIFF OF HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO BE FREE FROM CONTINUED DETENTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined several 42 USC 1983 causes of action against individual police officers should not have been dismissed. The Second Department noted allegations that individual police officers violated plaintiff's constitutional rights need not be based upon a municipal policy or custom. Plaintiff alleged the officers fabricated evidence and conspired with the district attorney's office to deprive him of his right to a fair trial and his right to be free from continued detention:

The plaintiff alleged … that the individual defendants, with knowledge that the plaintiff was not guilty, improperly caused the neup witness to identify the plaintiff as the shooter and thereafter caused him to be prosecuted. … [T]he allegations in the complaint were sufficient to plead the personal involvement of the individual defendants in the deprivation of the plaintiff's right to a fair trial … . Moreover, the Supreme Court improperly concluded that this cause of action was defective for failing to satisfy the "policy or custom" standard. Since the plaintiff was asserting a cause of action against the individual defendants in their individual capacities for an alleged constitutional violation … he was not required to allege facts satisfying that standard … . * * *

… [T]he complaint sufficiently stated a viable cause of action alleging a violation of the plaintiff's right to be free from continued detention insofar as asserted against the individual defendants. The complaint alleged that the individual defendants knowingly concealed, among other things, evidence regarding the improper lineup identification, thereby "suppress[ing] evidence that was favorable to the plaintiff during the criminal proceeding" … . …

[U]nder the intra-corporate or intra-enterprise conspiracy doctrine," and subject to certain exceptions, employees of "a public entity generally cannot conspire with [other] employees or agents" of the same entity, since "all are considered a single entity" … . Here, however, the doctrine is inapplicable because the plaintiff alleged that the individual defendants, members of the New York City Police Department, conspired with employees of a distinct governmental entity, the Queens County District Attorney's Office … . Pressley v City of New York, 2024 NY Slip Op 06563, Second Dept 12-24-24

Practice Point: Causes of action asserting the violation of constitutional rights by individual police officers, as opposed to by the police department as a municipal entity, need not allege the violations were pursuant to a department policy or custom.

Practice Point: Although a conspiracy to violate constitutional rights cannot be based upon an agreement among police officers in a single department, it can be based upon an agreement among police officers and district attorneys.

December 24, 2024

DWI, DEFINITION OF "IMPAIRED," SPLIT OF AUTHORITY, VEHICLE AND TRAFFIC LAW.

THE GRAND JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF "IMPAIRED" IN THE CONTEXT OF VEHICLE AND TRAFFIC LAW 1192 (4-A) (FELONY AGGRAVATED DRIVING WHILE INTOXICATED); THE FOURTH DEPARTMENT DISAGREED WITH THE DEFINITION OF "IMPAIRED" ADOPTED BY THE THIRD DEPARTMENT (FOURTH DEPT).

The Fourth Department, reversing County Court's dismissal of the felony aggravated driving while intoxicated count, in a full-fledged opinion by Justice Curran, determined the grand jury was properly instructed on the definition of

"impaired." The Fourth Department noted its disagreement with the Third Department on this issue:

… [T]he People correctly instructed the grand jury that the term "impaired" in the context of Vehicle and Traffic Law § 1192 (4-a) is defined as the defendant's consumption of a combination of drugs and alcohol to the point that it "has actually impaired, to any extent, the physical and mental abilities which [the defendant] is expected to possess in order to operate a vehicle as a reasonable and prudent driver" … .

In reaching that conclusion, we also note our respectful disagreement with the Third Department's decision in People v Caden N. (189 AD3d 84 [3d Dept 2020], lv denied 36 NY3d 1050 [2021]), which defined the term "impaired" in the context of drug consumption in accordance with the heightened standard typically applicable in cases of "intoxication" by alcohol … . Ultimately, we conclude that the term "impaired" should be defined consistently across the Vehicle and Traffic Law—whether in the context of impairment by alcohol or in the context of impairment by drugs or a combination of drugs and alcohol. * * *

… [T]he Court of Appeals, in Cruz, clearly defined the term "impaired" to mean—in the context of alcohol consumption—that a defendant "has actually impaired, to any extent, the physical and mental abilities which [they are] expected to possess in order to operate a vehicle as a reasonable and prudent driver" (48 NY2d [419] at 427 …). In defining "impaired" that way, the Court sharply distinguished the term "impaired" from the separate term "intoxication," as used in Vehicle and Traffic Law § 1192 (3), noting that the latter term denoted "a greater degree of impairment which is reached when [a] driver has voluntarily consumed alcohol to the extent that [they are] incapable of employing the physical and mental abilities which [they are] expected to possess in order to operate a vehicle as a reasonable and prudent driver" (Cruz, 48 NY2d [419] at 428). The Court concluded that the terms impaired and intoxicated are not interchangeable … . People v Dondorfer, 2024 NY Slip Op 06432, Fourth Dept 12-20-24

Practice Point: In the Fourth Department "impaired" in the context of felony aggravated driving while intoxicated (Vehicle and Traffic Law 1104 (4-a)" means impairment "to any extent [of] the physical and mental abilities which [the defendant] is expected to possess in order to operate a vehicle as a reasonable and prudent driver" … .

December 20, 2024

INEFFECTIVE ASSISTANCE, MOTION TO VACATE MURDER CONVICTION, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS ATTEMPTED MURDER CONVICTIONS ON INEFFECTIVE-ASSISTANCE-OF-COUNSEL GROUNDS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, reversing Supreme Court's grant of defendant's motion to vacate his attempted murder convictions, determined defendant's counsel (Lee) was not ineffective for failure to raise a medical-condition defense. Defendant argued he was incapable of running because of a gunshot wound. Several witnesses to the shooting testified the shooter ran after the victims:

It is unclear from the record as to whether Lee was informed of the existence of such a defense and that he ignored it without investigation. The record is devoid of any evidence, including an affidavit from counsel Brown [defendant's prior attorney], as to whether Brown followed up on securing the medical records or whether he informed Lee of their existence and possible significance. While Lee testified that he had no recollection of the specifics of the case and therefore of being told of such a defense, he testified that it was his custom and practice to discuss and investigate possible defenses with his clients. Defendant also testified that he discussed various defenses with Lee, which Lee followed up on.

… [I]t is of note that defendant did not assert the defense of medical impossibility, and Lee's alleged ineffectiveness in not presenting it, in defendant's appeal of his conviction on October 16, 2001, his pro se CPL 440 motion dated October 6, 2004, or his habeas corpus petition dated February 22, 2006. While Supreme Court acknowledged that it was "troubling that the issue was not raised in the habeas corpus application," it nevertheless dismissed the People's argument … . The significance of defendant's failure to raise the issue for over 19 years is two-fold. First, had defendant raised the issue earlier, Lee's recollections as to what he did and did not do would certainly have been clearer. More importantly, Lee's case files would be available for review and scrutiny. Despite Supreme Court's recognition that "the loss of Lee's file makes it impossible to prove that" Lee was in possession of the medical records or was aware of the records, it nevertheless improvidently concluded that Lee "conducted no investigation" and "did not look

for an expert or for the treating doctor to consult about the injury and its consequences."

Assuming Lee was informed of the existence of such a defense, defendant failed to overcome a "presumption" that the challenged action "might be considered sound trial strategy," and demonstrate the "absence of strategic or other legitimate explanations" for the alleged shortcomings … . People v Brown, 2024 NY Slip Op 06550, First Dept 12-24-24

Practice Point: Although fact-specific, this opinion provides in-depth analysis of several issues raised in defendant's motion to vacate his convictions, including ineffective assistance for failure to raise a defense, newly discovered evidence and actual innocence.

December 24, 2024

PROBATION CONDITIONS, APPEALS, JUDGES.

THE PROBATION CONDITION PROHIBITING DEFENDANT FROM USING PUBLIC TRANSPORTATION WAS NOT WARRANTED BY THE UNDERLYING CONVICTION; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL AND SURVIVES A WAIVER OF APPEAL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the probation condition prohibiting defendant from using the subway, trains or buses for three years was not warranted because defendant did not commit the underlying crime on public transportation. The issue need not be preserved for appeal and survives a waiver of appeal:

The court improperly imposed, as a condition of probation, a requirement that defendant "[r]efrain from using or entering any Metropolitan Transportation Authority subway, train, bus, or other conveyance or facility for a period of up to three years." Defendant did not commit the instant crime, or have a history of misconduct, on public transportation. Accordingly, the prohibition from using or entering any public transportation conveyance or facility was not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life … . Because this issue implicates the legality of the sentence imposed, it survives defendant's waiver of the right to appeal and does not require

preservation for appellate review … . People v Alvarez, 2024 NY Slip Op 06662, First Dept 12-31-24

Practice Point: A probation condition which is not warranted by the underlying conviction or by defendant's prior record may be reversed even if the issue has not been preserved and and/or appeal has been waived.

December 31, 2024

PROBATION CONDITIONS, APPEALS, JUDGES.

THE PROBATION CONDITION REQUIRING DEFENDANT TO AGREE TO SEARCHES OF HIS PERSON, VEHICLE AND RESIDENCE WAS NOT WARRANTED BY THE CONVICTION (LEAVING THE SCENE OF AN ACCIDENT); THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the probation condition requiring defendant to agree to searches of his person, residence and vehicle for drugs, weapons or contraband was not warranted by his conviction for leaving the scene of an accident. The issue need not be preserved for appeal:

… [T]he court improperly imposed, as a condition of probation, a requirement that defendant consent to a search by a probation officer of his person, vehicle, or residence for illegal drugs, drug paraphernalia, weapons, or contraband … . "Defendant was not under the influence of any substance or armed with a weapon when he committed the crime of which he was convicted" … , and he "had no history of violence or use of weapons" (People v Hall, 228 AD3d at 467). His single misdemeanor conviction for marijuana possession preceded the instant offense by nearly a decade … . Thus, the consent to search condition was not "'reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so'" … . We note that defendant's challenge to the conditions of his probation did not require preservation … and would not be foreclosed even if the appeal waiver were valid … . People v Fernandez, 2024 NY Slip Op 06671, First Dept 12-31-24

Practice Point: A probation condition requiring that defendant agree to searches of his person, vehicle and residence must be warranted by the nature of the underlying conviction. The condition was not warranted for "leaving the scene of an accident."

December 31, 2024

PROBATION CONDITIONS, APPEALS.

A WAIVER OF APPEAL DOES NOT PRECLUDE A CHALLENGE TO A PROBATION CONDITION REQUIRING CONSENT TO WARRANTLESS SEARCHES; IN THE PLEA PROCEEDINGS, DEFENDANT ADMITTED PUNCHING THE VICTIM; THE PROBATION CONDITION ALLOWING SEARCHES FOR DRUGS AND WEAPONS HAD NO CONNECTION TO THE UNDERLYING OFFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) a waiver of appeal does not preclude challenging a condition of probation requiring warrantless searches, and (2) there was no basis for requiring defendant to consent to warrantless searches:

… [D]efendant's challenge to the condition of probation requiring that he consent to warrantless searches survives even a valid waiver … . Here, during the plea proceedings, defendant admitted that he intentionally caused injury to the victim by punching him with a closed fist. The Department of Probation recommended that, as a condition of probation, defendant consent to warrantless searches for illegal drugs and weapons to help ensure the safety of the public and probation officers. We find that the condition of probation was not reasonably related to defendant's rehabilitation, given that defendant's conviction did not involve the use of a weapon and did not appear connected to the sale or use of drugs … . People v Thomas, 2024 NY Slip Op 06427, First Dept 12-19-24

Practice Point: A waiver of appeal does not preclude a challenge to a probation condition requiring consent to warrantless searches.

Practice Point: The probation condition requiring consent to warrantless searches must have some connection to the underlying offense. Searches for drugs and

weapons had no connection to the underlying offense in this case where defendant admitted punching the victim with his fist.

December 19, 2024

RIGHT TO COUNSEL, DENIAL OF, INEFFECTIVE ASSISTANCE, IMMIGRATION LAW, JUDGES.

THE DENIAL OF DEFENDANT'S REQUEST FOR COUNSEL OF HIS CHOICE, ASSIGNED COUNSEL'S DISPARAGING REMARKS, AND ASSIGNED COUNSEL'S FAILURE TO INFORM DEFENDANT DEPORTATION WAS MANDATORY, AMOUNTED TO A DEPRIVATION OF DEFENDANT'S RIGHT TO COUNSEL; GUILTY PLEA WITHDRAWN AND VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to withdraw and vacate his guilty plea should have been granted. Defendant did not receive effective assistance of counsel:

The People concede that defendant's right to counsel was violated by the court's ruling improperly prohibiting defendant from retaining an unpaid attorney who worked at a public defender organization which represented him on a related matter … , and by the conflict of interest between assigned counsel and defendant that arose from counsel's disparaging statements, in court and in written submissions, about defendant and his possible defense of accidental stabbing.

Defendant was also deprived of effective assistance when his counsel advised him that because of his plea, he will most likely be deported, since it is clear that defendant's conviction would trigger mandatory deportation … . People v Pan, 2024 NY Slip Op 06166, First Dept 12-10-24

Practice Point: The judge improperly prohibited defendant from obtaining counsel of his choice.

Practice Point: Assigned counsel's disparaging remarks about defendant created a conflict of interest.

Practice Point: Assigned counsel's failure to inform defendant deportation was mandatory constituted ineffective assistance.

December 10, 2024

SEARCHES AND SEIZURES, WARRANTLESS SEARCH OF EMPTY RESIDENCE NOT A "PROTECTIVE SWEEP."

THE POLICE WERE AWARE THAT NO ONE ELSE WAS IN THE RESIDENCE AT THE TIME DEFENDANT LEFT THE RESIDENCE AND WAS ARRESTED; THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS SEARCH OF THE HOUSE AFTER DEFENDANT'S ARREST; THE WEAPONS SEIZED SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to suppress the weapons seized when the police did a "protective sweep" of defendant's residence should have been granted. Defendant's wife and daughter had left the residence and told the police, who were outside the residence, only the defendant was inside. Defendant eventually left the residence and was arrested. Only then did the police enter for the "protective sweep:"

… [W]e conclude that there were no emergency or exigent circumstances justifying the warrantless search of the residence. Once defendant's daughter exited the dwelling, the officers knew from defendant's wife that no one else was in the dwelling except defendant. None of the officers at the scene witnessed anything that would lead them to suspect that there was another person in the residence. The "mere possibility" that a person could be inside the premises did not justify the search … . We also note that there was no indication that defendant had shot or injured anyone prior to the officers' arrival at his residence, and at no time had defendant threatened the police or anyone else at the residence. Under the circumstances, there was no legitimate reason for the police not to apply for a search warrant before entering the house. People v Swank, 2024 NY Slip Op 06449, Fourth Dept 12-20-24

Practice Point: A "protective sweep" of a residence that the police know to be vacant amounts to a warrantless search in the absence of exigent circumstances.

December 20, 2024

SEARCHES AND SEIZURES, SEARCH INCIDENT TO ARREST, EVIDENCE.

THE PEOPLE DID NOT PROVE THE SEARCH OF DEFENDANT'S FANNY PACK WAS A VALID SEARCH INCIDENT TO ARREST; CONVICTIONS REVERSED (FIRST DEPT).

The First Department, reversing defendant's convictions for tampering with evidence and resisting arrest, determined the search of defendant's fanny pack was not demonstrated to have been a valid search incident to arrest:

The People failed to demonstrate that the search of defendant's fanny pack was a proper search incident to a lawful arrest because they failed to establish either that the officer actually arrested defendant or intended to do so before opening his bag … . People v Lamberty, 2024 NY Slip Op 06669, First Dept 12-31-24

Practice Point: Here the People did not prove the officer who searched defendant's fanny pack actually arrested defendant or intended to arrest the defendant before opening pack. Therefore the People did not prove the search was a valid search incident to arrest.

December 31, 2024

SENTENCES, UNDULY HARSH.

DEFENDANT'S 140-YEARS-TO-LIFE SENTENCE IN THIS PREDATORY-SEXUAL-ASSAULT-OF-A-CHILD PROSECUTION DEEMED UNDULY HARSH AND SEVERE; THE PEOPLE HAD TWICE OFFERED A 15-20-YEAR SENTENCE; SENTENCE REDUCED TO 20-TO-LIFE (THIRD DEPT).

The Third Department held that defendant's 140 years-to-life sentence in this predatory-sexual-assault-of-a-child prosecution was unduly harsh and severe. The sentence was reduced to 20 years-to-life:

We turn to defendant's aggregate sentence of 140 years to life in prison. As a threshold matter, our determination that the sentences imposed on counts 2 and 15 must run concurrently reduces defendant's aggregate prison term to 118 years to life. The bulk of that remaining aggregate sentence is still consumed by the consecutive 22-years-to-life prison terms imposed for defendant's convictions of predatory sexual assault against a child under counts 2 and 15, 4, 5, 6 and 7.

Although defendant's crimes are heinous, the sentences on each of those counts are near the top end of the permissible range notwithstanding defendant's lack of any prior criminal history (see Penal Law § 70.80 [2] …). We also note that the People advocated for the 140-years-to-life aggregate sentence even though that sentence exceeded by over a century their plea offer of 12 to 15 years in satisfaction of all 15 counts of the indictment — an offer they extended twice.

Accordingly, we find that defendant's aggregate prison sentence is unduly harsh and severe (see CPL 470.15 [6] [b] …). We modify the sentences, in the interest of justice, by reducing the term of imprisonment imposed on defendant's convictions on the counts of predatory sexual assault against a child (counts 2, 4, 5, 6, 7 and 15) to 20 years to life, and we direct those sentences to run concurrently with each other. We further modify the sentences imposed on counts 8, 9, 10, 11 and 13 to run concurrently with each other and with the sentences imposed on counts 2 and 15, 4, 5, 6 and 7, resulting in an aggregate prison term of 20 years to life, to be followed by 10 years of postrelease supervision … . People v Mayette, 2024 NY Slip Op 06083, Third Dept 12-5-24

Practice Point: Here the court noted that the People had offered a 15-20-year sentence as part of a plea deal and then advocated for the 140-years-to-life sentence upon conviction, which was imposed. The Third Department reduced the sentence to 20-to-life.

December 5, 2024

SEVERENCE, MOTION TO SEVER TRIALS FOR TWO UNRELATED MURDERS PROPERLY DENIED, JUDGES.

THE DENIAL OF DEFENDANT'S MOTION TO SEVER THE CHARGES RELATING TO TWO SEPARATE MURDERS, COMMITTED NEARLY TWO YEARS APART, WAS NOT AN ABUSE OF DISCRETION; DEFENDANT DID NOT DEMONSTRATE THE JURY WOULD HAVE HAD DIFFICULTY CONSIDERING SEPARATELY THE PROOF FOR EACH OFFENSE (CT APP).

The Court of Appeals, affirming defendant's murder convictions, in a full-fledged opinion by Judge Halligan, over two comprehensive dissenting opinions, determined the denial of defendant's motion to sever the charges relating to two separate murders, committed nearly two years apart, was not error:

The first victim was the defendant's roommate, who was found dead in their shared apartment in 2013 after a fire that occurred under circumstances that later raised questions about her cause of death. The second victim was a woman whom defendant had hired to go on a date with him in December 2014; her body was found in a shallow grave in May 2015. The defendant was arrested in 2017 … . * * *

Where counts have been joined under CPL 200.20 (2) (c), the CPL provides that the trial court has discretion to sever them if doing so would be "in the interest of justice and for good cause shown" (id. 200.20 [3]). This provision has its origins in a 1936 amendment to the Code of Criminal Procedure that allowed joinder of "two or more acts or transactions constituting crimes of the same or a similar character which are neither connected together nor parts of a common scheme or plan" … .

The statute specifies two situations that establish good cause: first, where there is "[s]ubstantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense"; and second, where there is "[a] convincing showing that a defendant has both important testimony to give concerning one count and a genuine need to refrain from testifying on the other, which satisfies the court that the risk of prejudice is substantial" … . The statute expressly notes that good cause is not limited to these grounds … , and we have explained that "a defendant's fundamental right to a fair trial free of undue prejudice" must be protected when offenses are joined for trial … . …

… The defendant asserts that "the jury was incapable of considering the proof separately with respect to each offense" because the proof of each crime was "markedly different" and "dissimilar." … [But] the key question is whether it would be difficult for the jury to consider separately the proof for each offense … . People v Mero, 2024 NY Slip Op 06385, CtApp 12-19-24

Practice Point: Consult this opinion, especially the extensive dissents, for a comprehensive discussion of the issues raised by trying a defendant for two unrelated murders, separated by years, in a single trial.

December 19, 2024

SEX OFFENDER REGISTRATION ACT (SORA), HEARSAY, JUDGES.

BEFORE HEARSAY CAN BE RELIED UPON BY THE COURT FOR A SORA RISK-LEVEL ASSESSMENT, THE PEOPLE MUST ESTABLISH A FOUNDATION SUPPORTING THE RELIABILITY OF THE HEARSAY (THIRD DEPT).

The Third Department, reversing County Court and remitting the SORA risk-assessment proceeding, determined County Court should not have relied on hearsay to prove that the adult in a photograph depicting sexual activity between an adult and a child was the defendant. The case was remitted to allow the People the opportunity to establish a foundation for the reliability of the hearsay:

In assessing defendant 25 points under risk factor 2 for sexual contact with the victim, County Court relied upon a contested statement in the case summary made by an assistant district attorney to the author of the case summary. The assistant district attorney stated that defendant had possessed an image depicting him and his female relative engaged in sexual activity. The People concede, and we agree, that County Court improperly relied upon this hearsay, without making an inquiry into its reliability, in assessing 25 points under risk factor 2 for sexual contact with the victim. While the court found that the photographs depicted sexual activity between the child and an adult, it made no finding that defendant was that adult. The People therefore failed to establish by clear and convincing evidence that there was any sexual contact between defendant and the victim … .

Although defendant argues that the remedy for the error is to subtract 25 points from risk factor 2 and, upon doing so, designate him a risk level one sex offender, we agree with the People that the more appropriate course is to remit the matter to the SORA court "to provide the District Attorney an opportunity to establish a foundation" supporting the hearsay's reliability … . People v Davis, 2024 NY Slip Op 06632, Third Dept 12-26-24

Practice Point: The People must establish a foundation supporting the reliability of any hearsay relied upon by the court in a SORA risk-level assessment proceeding.

December 26, 2024

SPEEDY TRIAL, ILLUSORY "READY FOR TRIAL" ANNOUNCEMENT.

THE PEOPLE'S "READY FOR TRIAL" STATEMENT, MADE BEFORE THE INDICTMENT WAS FILED, WAS CONCEDEDLY ILLUSORY; DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY-TRIAL GROUNDS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the People conceded the statement of readiness for trial was illusory. Therefore defendant's motion to dismiss the indictment on speedy-trial grounds should have been granted:

"Ready for trial" for purposes of CPL 30.30 means "present readiness, not a prediction or expectation of future readiness" … . "A statement of readiness at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" … .

Here, as the People correctly concede, their statement of readiness filed on November 9, 2021, before the filing of the indictment, was illusory and thus ineffective to stop the speedy trial clock … . The People also acknowledge that they did not thereafter declare their readiness until after the six-month period had expired and, therefore, that the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial should have been granted … . People v Moore, 2024 NY Slip Op 06214, Second Dept 12-11-24

Practice Point: A "ready for trial" statement which is a prediction or an expectation of future readiness is illusory and invalid.

December 11, 2024

STREET STOPS, JUVENILE DELIQUENCY, FAMILY LAW, EVIDENCE.

IN THIS JUVENILE DELINQUENCY PROCEEDING, THE JUVENILE'S BEHAVIOR—LOOKING AT THE UNDERCOVER VEHICLE AND TURNING HIS BICYCLE AROUND—DID NOT PROVIDE THE POLICE WITH REASONABLE SUSPICION JUSTIFYING THE STREET STOP (FIRST DEPT).

The First Department, reversing Family Court's finding there was reasonable suspicion justifying the street stop of the juvenile, determined the officers' observation of the juvenile's "look[ing] in the direction of one of the unmarked vehicles, back pedal[ing], duck[ing], turn[ing] the bicycle around and rid[ing] in the opposite direction" was not sufficient. The police had been alerted to a gunshot in the area. A handgun was retrieved from the juvenile:

… [T]he totality of the circumstances did not support Family Court's finding that the officer had reasonable suspicion to justify the stop, and his detention was unlawful because appellant's "equivocal or innocuous behavior" was "susceptible of an innocent as well as a culpable interpretation" … . Police, in two unmarked vehicles, while canvassing the area in response to a "Shotspotter" sensor report of shots fired, observed appellant riding a bicycle on the sidewalk. An officer observed appellant look in the direction of one of the unmarked vehicles, back pedal, duck, turn the bicycle around and ride in the opposite direction. The officer found appellant's actions suspicious, exited the vehicle, approached appellant, ordered him to stop, grabbed him by both wrists and pushed him against the wall. While appellant was detained another officer observed a bulge in appellant's pocket, squeezed the pocket area and retrieved a firearm.

Although an officer observed an L-shaped object in appellant's pocket during the detention, there is no evidence or any reasonable inference that the officer "was in a position to view the contraband absent the unlawful detention" … . Matter of W.P., 2024 NY Slip Op 06426, First Dept 12-19-24

Practice Point: Here the police were canvassing the area after a report of a gunshot. They stopped the juvenile after observing him look at their undercover vehicle and turn his bicycle around. A handgun was retrieved during the stop. The First Department held the observations did not provide the police with "reasonable suspicion" and the street stop was therefore not justified.

December 19, 2024

STREET STOPS, JUVENILE DELINQUENCY, FAMILY LAW, EVIDENCE.

THE ORDER OF FACT-FINDING IN THIS JUVENILE DELINQUENCY PROCEEDING WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE STREET STOP WAS NOT SUPPORTED BY REASONABLE SUSPICION; AND THE SHOWUP IDENTIFICATION PROCEDURE WAS UNDULY SUGGESTIVE (SECOND DEPT).

The Second Department, reversing the order of disposition in this juvenile delinquency proceeding, determined the order of fact-finding was against the weight of the evidence, the appellant was stopped by the police in the absence of reasonable suspicion, and the victim's identification of the appellant should have been suppressed. The victim was struck from behind and saw only the backs of the assailants' heads. The identification was made from a police car at a distance of 240 feet, and the show-up identification procedure was unduly suggestive:

… [W]hile the complainant initially claimed that he had a momentary opportunity to see his alleged assailants' faces after he stood up, he later acknowledged that he merely observed "the backs of their heads" as they fled. Moreover, the credibility of the complainant's testimony was undermined by his claim to have been able to identify the appellant during a showup identification procedure from a significant distance in the backseat of a police car using only one eye. * * *

… [T]he testimony presented at the suppression hearing established that the police, using two police cars, stopped the appellant and two companions because they fit the general description given by the complainant of "black male[ ]" "youths" riding bicycles. The presentment agency did not present any evidence at the suppression hearing that the appellant and his companions were engaged in any suspicious behavior at the time of the police stop. Moreover, at the time of the police stop, the appellant was with only two companions, which conflicted with the complainant's description of "five youths." Under these circumstances, the evidence presented at the suppression hearing was insufficient to establish that the police had reasonable suspicion to stop the appellant … . * * *

Wayne Bowman, a police officer who accompanied the complainant during the showup identification procedure, testified at the suppression hearing that he assured the complainant that "[w]e're far enough back they're not going to be able to see you" and acknowledged that he and the complainant were positioned about the distance of "[a] football field" away from the appellant and his companions

during the showup identification procedure. Moreover, the complainant acknowledged at the suppression hearing that prior to the showup identification procedure, Bowman told him that the police "had stopped people that fit the description." Under these circumstances, the Family Court improperly determined that the showup identification procedure was reasonable and not unduly suggestive … . Matter of Ahmand T., 2024 NY Slip Op 06051, Second Dept 12-4-24

Practice Point: The identification-evidence in this juvenile delinquency proceeding was too weak to support the order of disposition.

Practice Point: The street stop was not supported by reasonable suspicion.

Practice Point: The showup identification procedure was unduly suggestive.

December 4, 2024

TRAFFIC STOPS, EVIDENCE, JUDGES.

AT THE SUPPRESSION HEARING THE PEOPLE FAILED TO PROVE THE LEGALITY OF THE TRAFFIC STOP, WHICH WAS BASED UPON DEFENDANT'S MAKING U-TURNS, AND THE SUPPRESSION MOTION WAS GRANTED; THE PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO REARGUE THE MOTION AND PRESENT EVIDENCE DEMONSTRATING THE U-TURNS WERE, IN FACT, ILLEGAL (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the judge in this DWI prosecution should not have granted the People's motion to reargue the suppression motion. The court had initially granted defendant's motion to suppress because the People failed to prove U-turns made by the defendant were illegal. When the suppression motion was reargued, the People presented evidence the U-turns were, in fact, illegal and the court denied suppression:

… [I]f the People have had a full and fair opportunity to oppose suppression, and the suppression court has issued a ruling on the merits, the People may not have an additional "opportunity to shore up their evidentiary or legal position" … . Under the circumstances of this case, where the People were unprepared for the suppression hearing and sought to reargue the legal issue to remedy their lack of preparedness, the same principle should apply.

At a suppression hearing, the People bear the burden of showing the legality of the police conduct in the first instance … . Here, the court granted defendant's motion for suppression because the People failed to demonstrate that defendant's U-turns were illegal and therefore that the stop was lawful. Neither the Assistant District Attorney nor the arresting officer could identify any traffic law provision violated by defendant. Moreover, the People did not request a recess or adjournment to determine the statutory basis for the stop, nor did they request permission to furnish a post-hearing submission to identify any relevant provision of law. Instead, the People returned a month after the court granted suppression, offering a different legal theory that they had not raised at the original suppression hearing. On that new legal theory, the court changed course and denied defendant's motion to suppress.

Of course, "[b]efore sentence is imposed, trial courts in criminal cases have the general inherent authority to correct their own mistakes" … , which may include granting leave to reargue. Although the People may be permitted to reargue the legal or factual issues of the suppression proceedings, allowing the suppression court to grant the People's motion to reargue in these circumstances would run afoul of our "full and fair opportunity" principle and the policies of finality and judicial efficiency underlying it. People v Lawson, 2024 NY Slip Op 06238, CtApp 12-12-24

Practice Pont: As a general rule, the People should have only one chance to demonstrate the legality of a traffic stop in the context of a suppression hearing. Once a suppression motion is granted, the People should not be allowed to reopen the hearing to present evidence which could have been presented the first time around.

December 12, 2024

TRAFFIC STOPS, DWI, EVIDENCE, VEHICLE AND TRAFFIC LAW.

DEFENDANT'S CROSSING THE FOG LINE ON THE RIGHT SIDE OF THE HIGHWAY THREE TIMES IN SECONDS CONSTITUTED PROBABLE CAUSE FOR THE TRAFFIC STOP (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined there was probable cause for the traffic stop which resulted in a DWI conviction.

Defendant's car crossed the fog line on the right side of the roadway three times within seconds:

When a driver swerves over the fog line repeatedly, in quick succession, they have failed to "drive[ ] as nearly as practicable entirely within a single lane" in violation of VTL § 1128 (a) (see e.g. Schoonmaker v New York State Dept. of Motor Vehicles, 33 NY3d 926, 928 [2019] [testimony that vehicle "ma(de) an erratic movement off the right side of the road, crossing the fog line and moving off the shoulder with the vehicle's right front tire" provided substantial evidence that stop was lawful under VTL § 1128 (a)]; People v Tandle, 71 AD3d 1176, 1177, 1178 [2d Dept 2010]; People v Parris, 26 AD3d 393, 394 [2d Dept 2006]; cf. People v Davis, 58 AD3d 896, 898 [3d Dept 2009] [police officer's testimony that driver had made "brief contacts with the fog line," but not that driver was, for example, "weaving, driving erratically or even that he drove onto the shoulder" was insufficient to support traffic stop under VTL § 1128 (a)]). On these facts, the troopers' observations, which were credited by the suppression court, established probable cause for the traffic stop. Therefore, the court properly denied the motion to suppress. People v Rufus, 2024 NY Slip Op 06384, CtApp 12-19-24

Practice Point: Here defendant's crossing the fog line on the right side of the highway three times in seconds violated the Vehicle and Traffic Law and constituted probable cause for the traffic stop.

December 19, 2024